Supreme Court, U.S.
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No. 97-1495

In The

Supreme Court of the United States

October Term, 1997

GENE ALLEN: DAVENPORT,

Petitioner,

v.

ORVILLE L. COADY, ARTHUR P. BARNES, PATRICK KENNER, NANCY MCLAUGHLIN, JOSEPH MURRAY, LLOYD VANCLEEF, GARY R. YOUNG,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS, NANCY C. MCLAUGHLIN AND GARY R. YOUNG

SCOTT E. DANIEL*
BRASHEAR & GINN
800 Farnam Plaza
1623 Farnam Street
Omaha, Nebraska 68102-2106
(402) 348-1000
Attorneys for Respondents, on behalf of Gary R. Young and Nancy McLaughlin

* *Counsel of Record*

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OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED FOR REVIEW

Whether dismissal of Petitioner's complaint by the United States District Court for the District of Nebraska, and subsequent affirmance by the United States Court of Appeals for the Eighth Circuit, violated Petitioner's rights so as to warrant granting of Petition for Writ of Certiorari to the United States Supreme Court?

LIST PURSUANT TO RULE 24.1(b)

The following are all parties to the proceeding in the court whose judgment is under review.

Gene Allen: Davenport
Orville L. Coady
Arthur P. Barnes
Patrick Kenner
Nancy McLaughlin
Joseph Murray
Gary R. Young

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BRIEF IN OPPOSITION

Respondents pray that the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit be denied

STATEMENT

Petitioner filed a complaint against seven individuals in the United States District Court for the District of Nebraska. Petitioner alleged that Respondents had violated his constitutional rights, had conspired to violate those rights, had failed to prevent said violations and, as to the Respondents who practice law, had committed malpractice.

The complaint was comprised solely of conclusory statements. The Petitioner did not state the specific rights which Respondents allegedly violated; nor did he allege any facts demonstrating or supporting the purported violations. Excerpts from the complaint follow:

> 8. The Judge knew that the Constitutional Laws of the United states[sic] of America were correct, but acted against the Private Citizen(s), pursuant to, TITLE 18 U.S.C. 1621.
>
> 9. Attorneys are guilty of "Legal Malpractice", when they fail to use the skill, prudence, and diligence, Lawyers of ordinary skill and capacity, commonly possess and exercise in performance of tasks, undertaken. When failure proximately causes damage, this gives use to an action in "tort". *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6

> Cal.3d 176, 98 Cal. Rptr. 837, 838, 491 P.2d 421.
>
> 11. The Plaintiff's GOD Given Rights, Constitutional Rights, and Immunities secured by the Constitution of the United states[sic] of America, in Amendments I, IV, V, VII, IX, and X were violated by the Defendants.

Petitioner's complaint concluded with a list of the alleged violations against the respective Respondents. Those allegations were presented in the following manner:

> 19. Plaintiff(s) is accusing the Defendant Judge(s), with all of the following charges:
>
> Count I . . . "Perjury of Oath"; TITLE 18 Chapter 79 U.S.C. 1621
>
> Count II . . . "Duress"; Head v. Gadsden Civil Serv. Bd., Ala.Civ.App., 389 So.2d 516, 519
>
> Count III . . . "Chilling Effect Doctrine", North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656. (BLACKS LAW).
>
> Count IV . . . "Deprivation of Rights", Section 1985 of TITLE 42
>
> Count V . . . "Constitutional Tort", TITLE 42 U.S.C. Sec. 1983

Now, for the first time, Petitioner sets forth facts in his Petition for Writ of Certiorari in an effort to support the conclusions he reached in his complaint. Petitioner did not make any of these facts available to the district court, appellate courts or the parties at any time prior to filing his Petition herein.

Numerous motions followed the filing of the Petitioner's complaint. All Respondents filed motions to dismiss the complaint for failing to state a claim upon which relief could be granted. The Petitioner filed motions for summary judgment, a motion to deny Respondent Coady's motion to dismiss and a motion for default judgment as against Respondents McLaughlin and Young. Respondents filed responses in opposition to Petitioner's motion for summary judgment.

United States District Judge Richard G. Kopf referred the complaint and the various motions to a magistrate judge pursuant to Title 28 U.S.C. § 636(b)(1)(B). In accord with that rule, United States Magistrate Judge David L. Piester reviewed all pleadings and prepared a Memorandum, Order and Recommendation as allowed by 28 U.S.C. § 636(b)(1)(C) and Rule 72.4 of the Local Rules of the United States District Court for the District of Nebraska.

Judge Piester found that the "[p]laintiff fails to set forth the alleged conduct attributable to each of the numerous defendants." He then set forth the requirements of Federal Rule of Civil Procedure 8 regarding the contents of a complaint and demonstrated how Petitioner failed to meet those requirements. After admonishing the Petitioner for filing a complaint containing allegations identical to those which he had previously filed against different defendants, Judge Piester concluded the Memorandum with a recommendation to Judge Kopf that Petitioner's complaint be dismissed for failure to state a cause of action, that the motion for sanctions be denied, and that Petitioner's motion for summary judgment be denied as moot.

Petitioner filed an objection to the magistrate's Memorandum, Order and Recommendation ("Recommendation"). United States District Judge Kopf conducted a de novo review of the portions of the Recommendation to which Petitioner objected and issued his own Memorandum and Order ("Order") which found that Judge Piester's Recommendation "fully, carefully and correctly applied the law." Judge Kopf's Order adopted Judge Piester's Recommendation which, *inter alia*, dismissed Petitioner's complaint with prejudice.

Petitioner filed an appeal of that Order with the United States Court of Appeals for the Eighth Circuit. Petitioner's appellate brief contained conclusory allegations similar to those set forth in his original complaint. The Eighth Circuit summarily affirmed the District Court's dismissal of Petitioner's complaint with prejudice for failing to comply with Federal Rule of Civil Procedure 8.

ARGUMENT

I. THE SUPREME COURT SHOULD NOT GRANT CERTIORARI WHERE, AS HERE, NO CONFLICT AMONG THE COURTS OF APPEALS EXISTS AND THE PETITIONER'S CASE DOES NOT INVOLVE ISSUES OF GRAVE IMPORTANCE TO THE PUBLIC INTEREST.

Jurisdiction to review decisions of the courts of appeals is to be used sparingly and primarily for two purposes. *Ex parte Lau Ow Bew*, 141 U.S. 583 (1891); *In re Woods*, 143 U.S. 202 (1892); *Lau Ow Bew v. United States*,

144 U.S. 47 (1892); *American Constr. Co. v. Jacksonville, T. & K. W. Ry.*, 148 U.S. 372 (1893); *Forsyth v. City of Hammond*, 166 U.S. 506 (1897); *Fields v. United States*, 205 U.S. 292 (1907); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1916); *Ohio ex rel. Seney v. Swift & Co.*, 260 U.S. 146 (1922). First, the United States Supreme Court has reviewed cases by writs of certiorari from Circuit Courts of Appeals to secure uniformity of decision when a conflict exists among courts. *Id.*, *Magnum Import Co. v. Coty*, 262 U.S. 159 (1923).

For example, in *Insurance Corp. v. Compagnie Des Bauxites*, 456 U.S. 694 (1982), the Court of Appeals for the Third Circuit acknowledged that the Fifth Circuit's position on a discovery issue "appears to be to the contrary, but we find ourselves in disagreement with that case". Another example of a case which falls under this category is *United States v. Lorenzetti*, 467 U.S. 167 (1984). The Supreme Court granted certiorari in *Lorenzetti* to review an opinion of the Court of Appeals for the Third Circuit which recognized that its interpretation of a statute was "squarely inconsistent" with that of the Sixth Circuit. *Id.* *See also, e.g., City of New York v. Saper*, 336 U.S. 328, 328 (1949) (conflict related to an issue "of importance in the administration of the Bankruptcy Act."); *United Bhd. of Carpenters and Joiners v. United States*, 330 U.S. 395, 400 (1947) ("conflict involves an important question of statutory construction"); *Commissioner v. Bilder*, 369 U.S. 499, 501 (1962) (certiorari granted because of "the need for a uniform rule on the point"); *Lehman v. Lycoming County Children's Servs. Agency*, 458 U.S. 502, 507 (1982) (certiorari granted because matter involved "a question of

importance not heretofore considered by this Court, and one over which the Circuits are divided").

This Court has also granted certiorari when a decision of a court of appeals appears to be in conflict with Supreme Court precedent. Such a conflict usually arises through a misinterpretation or misapplication of the precedent. *United States v. Doe*, 465 U.S. 605, 610 (1984); *Lugor v. Edmondson Oil Co.*, 457 U.S. 922, 926 (1982); *Army & Air Force Exch. Serv. v. Sheehan*, 456 U.S. 728, 733 (1982). The instant petition presents no such conflict among courts. Hence, a grant of certiorari on that basis is unwarranted.

The second category of cases in which this Court has granted certiorari involves issues of grave importance to the public interest which would benefit the public interest to have the Court of last resort decide. *Id.* Such cases for which certiorari was granted include those involving important constitutional issues. For example, this Court granted certiorari "to review the exercise of the grave power of annulling an Act of Congress," *United States v. Gainey*, 380 U.S. 63, 65 (1965), and to review the invalidation of a state statute under the federal Constitution because "this holding brings into question the constitutionality of a statute now in force in forty-two States and the Commonwealth of Puerto Rico." *New York v. O'Neill*, 359 U.S. 1, 3 (1959). Other cases which this Court deemed "gravely important" encompassed issues such as the irreconcilability of certain convictions regarding demonstration and assembly rights with the Fourteenth Amendment of the United States Constitution, *Edwards v. South Carolina*, 372 U.S. 229, 230 (1963), the applicability of the Confrontation Clause of the Sixth Amendment to the states, *United States v. Gouveia*, 467 U.S. 180 (1984), and

the constitutionality of a California statute relating to due process because the issues presented were found to be important "not only to California but to other States which have similar laws." *McGee v. International Life Ins. Co.*, 355 U.S. 220, 221 (1957).

The Supreme Court has also granted certiorari in cases which involve important federal statutory issues. *See, e.g., American Fed'n. of Musicians v. Wittstein*, 379 U.S. 171, 175 (1964) (question presented is "an important one of first impression" under the statute); *Laing v. United States*, 423 U.S. 161, 167 (1976) (resolutions of a tax law conflict would affect seventy cases pending in federal courts); *United States v. Donovan*, 429 U.S. 413, 422 (1977) (question presented involved "construction of a major federal statute"). Other issues which have satisfied the standard of "grave importance" involve significant jurisdictional and procedural issues. *See, e.g., Bruner v. United States*, 343 U.S. 112 (1952) (involving jurisdiction of federal district courts); *Zahn v. International Paper Co.*, 414 U.S. 291 (1973) (involving the jurisdictional amount in class action suits); *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 255 (1946) (involving the proper establishment of federal jury panels).

The questions which Petitioner herein seeks to present for review include whether the Nebraska District Court Judge violated the Federal Rules of Civil Procedure, Rule 38(a) and whether the particular judges of the United States appellate and district courts are "required to follow their Oaths to uphold the Constitution?" Notwithstanding the rhetorical nature of the latter question, without a factual basis whatsoever to support

such claims, Petitioner's questions involve neither a conflict between the courts of the land nor any issue worthy of consideration by this Court through a grant of certiorari.

CONCLUSION

The issues which Petitioner presents for review do not involve a conflict between the courts of appeals or a matter of grave importance to the public interest. Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

SCOTT E. DANIEL*
BRASHEAR & GINN
800 Farnam Plaza
1623 Farnam Street
Omaha, Nebraska 68102-2106
Tel. No. (402) 348-1000
Attorneys for Respondents, on behalf of Gary R. Young and Nancy McLaughlin

* *Counsel of Record*